Case C-384/09

Prunus SARL and Polonium SA

v

Directeur des services fiscaux

(Reference for a preliminary ruling from the

tribunal de grande instance de Paris)

(Direct taxation – Free movement of capital – Article 64 TFEU – Legal persons established in a non-Member State – Ownership of immovable property located in a Member State – Tax on the market value of that property – Refusal of exemption – Assessment with regard to overseas countries and territories – Combating tax evasion – Joint and several liability)

Summary of the Judgment

1. *Free movement of capital – Provisions of the Treaty – Territorial scope – Overseas countries and territories – Whether they are included as non?Member States*

(Art. 63 TFEU)

2. *Free movement of capital – Restrictions on movements of capital to and from non-Member States – Restrictions existing on 31 December 1993 – Tax on the market value of immovable property*

(Arts 63 and 64(1) TFEU)

1. In view of the unlimited territorial scope of Article 63 TFEU, it must be regarded as necessarily applying to movements of capital to and from overseas countries and territories (OCTs).

However, OCTs are subject to the special association arrangements set out in Part Four of the Treaty, with the result that, failing express reference, the general provisions of the Treaty, whose territorial scope is in principle confined to the Member States, do not apply to them. OCTs therefore benefit from the provisions of Union law in a similar manner to the Member States only when Union law expressly provides that OCTs and Member States are to be treated in such a manner.

The EU and FEU Treaties do not contain any express reference to movements of capital between Member States and OCTs. It follows that OCTs benefit from the liberalisation of the movement of capital provided for in Article 63 TFEU in their capacity as non?Member States.

(see paras 20, 29-31)

2. Article 64(1) TFEU must be interpreted as meaning that Article 63 TFEU is without prejudice to the application of national legislation in force on 31 December 1993 which exempts from the tax on the market value of immovable property located in the territory of a Member State of the European Union companies having their registered office in the territory of that State and

makes entitlement to that exemption, for a company whose registered office is in an overseas country or territory, conditional either on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between that Member State and that territory or on there being a requirement, under a treaty containing a clause prohibiting discrimination on grounds of nationality, that those legal persons are not to be taxed more heavily than companies established in the territory of that Member State.

(see para. 38, operative part)

JUDGMENT OF THE COURT (Third Chamber)

5 May 2011 (*)

(Direct taxation – Free movement of capital – Article 64 TFEU – Legal persons established in a non-Member State – Ownership of immovable property located in a Member State – Tax on the market value of that property – Refusal of exemption – Assessment with regard to overseas countries and territories – Combating tax evasion – Joint and several liability)

In Case C?384/09,

REFERENCE for a preliminary ruling under Article 234 EC from the tribunal de grande instance de Paris (France), made by decision of 9 September 2009, received at the Court on 29 September 2009, in the proceedings

Prunus SARL,

Polonium SA

v

Directeur des services fiscaux,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and G. Arestis (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2010,

after considering the observations submitted on behalf of:

– Prunus SARL and Polonium SA, by P. Guillet and E. Clément, avocats,

– the French Government, by G. de Bergues, A. Adam and J.-S. Pilczer, acting as Agents,

– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

– the Danish Government, by B. Weis Fogh, acting as Agent,

– the Estonian Government, by L. Uibo, acting as Agent,

– the Spanish Government, by M. Muños Pérez, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

– the Swedish Government, by A. Falk and C. Meyer-Seitz, acting as Agents,

– the United Kingdom Government, by H. Walker, acting as Agent, and S. Ford, Barrister,

– the European Commission, by R. Lyal and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 63 et seq. TFEU. The questions raised by the present case essentially ask, first, whether the French tax on the market value of immovable property owned in France by a company established in a Member State is also applicable where the company is established in an overseas country or territory (OCT), being in the present case the British Virgin Islands, and, second, whether the joint and several liability for payment of that tax on the part of any legal person interposed between the party or parties liable to the tax and the immovable properties located in France constitutes a restriction of free movement of capital.

2 The reference was made in proceedings between Prunus SARL ('Prunus') and Polonium SA ('Polonium') and the directeur général des impots and the directeur des services fiscaux d'Aix-en-Provence (collectively, 'the French tax authorities') concerning Prunus' joint and several liability for payment of the tax on the market value of immovable property owned in France by legal persons ('the 3% tax') of two companies which hold shares in Prunus.

Legal context

European Union law

3 On 25 July 1991, the Council adopted Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1) ('the Sixth OCT Decision'), which was applicable until 1 December 2001.

4 As regards capital movements, Article 180(1) of the Sixth OCT Decision provides as follows:

'With regard to capital movements linked with investment and to current payments, the relevant authorities of the OCT and the Member States of the Communities shall refrain from action in the field of foreign exchange transactions which would be incompatible with their obligations under this

Decision resulting from the provisions on trade in goods and services, establishment and industrial cooperation. These obligations shall not, however, prevent the adoption of the necessary protection measures should they be justified by reasons relating to serious economic difficulties or severe balance-of-payments problems.'

5 On 27 November 2001, the Council adopted Decision 2001/822/EC on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1) ('the Seventh OCT Decision'), which entered into force on 2 December 2001.

6 As regards capital movements, Article 47(1)(b) of the Seventh OCT Decision provides that, without prejudice to paragraph 2 of that provision, 'with regard to transactions on the capital account of balance of payments, the Member States and the OCT authorities shall impose no restrictions on the free movement of capital for direct investments in companies formed in accordance with the laws of the host Member State, country or territory and [to] ensure that the assets formed by such investment and any profit stemming therefrom can be realised and repatriated'. Article 47(2) provides that the European Union, Member States and OCTs are entitled, inter alia, to take the measures referred to *mutatis mutandis* in Article 64 TFEU in accordance with the conditions laid down therein.

National law

7 Article 990 D et seq. of the code général des impôts (General Tax Code) ('the CGI') forms part of the measures adopted by the French legislature to combat certain forms of tax avoidance.

8 Article 990 D of the CGI, as applicable to the facts in the main proceedings, provides as follows:

'Legal persons which, directly or through an intermediary, own one or more immovable properties situated in France or are the holders of rights in rem over such properties shall be liable to pay an annual tax of 3% of the market value of those properties or rights.

Any legal person which possesses an interest, in whatever form or quantity, in a legal person which is the owner of such properties or rights or which possesses an interest in a third legal person, which is itself the owner of the properties or rights or is itself an intermediary in the chain of interests, shall be deemed to own immovable properties or hold rights in immovable property in France through an intermediary. This provision shall apply irrespective of the number of intermediary legal persons.'

9 Article 990 E of the CGI, as applicable to the facts in the main proceedings, states as follows:

'The tax laid down in Article 990 D shall not be applicable to:

1. Legal persons of which the immovable assets, within the meaning of Article 990 D, situated in France, represent less than 50% of their total assets in France. For the application of this provision, immovable assets shall not include those assets which the legal persons referred to in Article 990 D or intermediaries allocate for their own professional activity if not related to property;

2. Legal persons which, having their seat in a country or territory which has concluded with France a convention on administrative assistance to combat tax evasion and avoidance, declare each year, by 15 May at the latest, at the place established by the decree referred to in Article 990 F, the location, description and value of the properties in their possession as at 1 January, the

identity and the address of their shareholders at the same date and the number of shares held by each of them;

3. Legal persons which have their effective centre of management in France or other legal persons which, by virtue of a treaty, must not be subject to a heavier tax burden, when they communicate each year, or take on and comply with the obligation to communicate to the tax authority, at its request, the location and description of the properties owned as at 1 January, the identity and the address of their shareholders, partners or other members, the number of shares or other rights held by each of them and evidence of their residence for tax purposes. The obligation shall be entered into on the date on which the legal person acquires the immovable property or the right in immovable property or the shareholding referred to in Article 990 D or, in respect of immovable properties, rights in immovable properties or shareholdings already in its possession on 1 January 1993, by 15 May 1993 at the latest;

…'

10 Article 990 F of the CGI, as applicable to the facts in the main proceedings, provides as follows:

'The tax shall be levied on immovable property owned and rights in immovable property held on 1 January of the tax year, with the exception of assets duly recorded as forming part of the stocks of legal persons engaged in the occupation of property seller or property developer. Where there is a chain of interests, the tax shall be payable by the legal person or persons which, in that chain, are closest to the property or property rights and which are not exempt from payment under the second or third paragraph of Article 990 E. Any legal person interposed between the party or parties liable to the tax and the immovable property or immovable property rights shall be jointly and severally liable for payment of the tax.

Any legal person which, having failed to comply with the obligation laid down in the third paragraph of Article 990 E, has become liable for payment of the tax provided for in Article 990 D, may be exempt from payment as from the year in which it communicates the information referred to in the said third paragraph to the tax authority and takes on a new obligation to communicate such information to the authority in future, at its request.

The persons liable for payment of the tax must declare at the latest by 15 May each year the location, description and value of the immovable property and immovable property rights in question. That declaration, together with payment of the tax, shall be lodged at the place established by decree of the Minister responsible for the budget.

The tax shall be collected in accordance with the rules and subject to the penalties and guarantees applicable to registration duties. The provisions in Article 223d A shall also be applicable.

If the immovable property is transferred, the representative referred to in paragraph I of Article 244a A shall be liable for payment of the tax outstanding at that date.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Prunus, a company established in France, is wholly owned by Polonium, a holding company governed by Luxembourg law established in Luxembourg. In turn, Polonium is wholly owned in equal shares by Lovett Overseas SA and Grebell Investments SA ('Lovett and Grebell'), which are registered in the British Virgin Islands.

12 From 1998 to 2002, Prunus owned, directly or indirectly, a number of properties located in

France.

13 Prunus and Polonium complied with their reporting obligations and were exempt from payment of the 3% tax under Article 990 E of the CGI.

14 On the other hand, Lovett and Grebell, the last links in the chain of interests, were liable to the tax charged on the market value of the property owned, directly or indirectly, in France by Prunus, in the amount of 50% each, since neither of those companies satisfied the conditions of exemption laid down in the third paragraph of Article 990 E of the CGI.

15 On 19 September 2005 and 24 January 2006, the French tax authorities gave formal notice to Prunus to pay the amounts for which Lovett and Grebell were liable under tax adjustment notices issued on 7 May 2003 in its capacity as joint and several debtor of the 3% tax owed by those companies. Since the objections lodged by Prunus on 30 September 2005 and 8 February 2006 were rejected by decision of 12 December 2006, it appealed against that rejection before the tribunal de grande instance de Paris with a view to obtaining remission of that tax in respect of 2001 and 2002 in its capacity as joint and several debtor.

16 Polonium was granted leave to intervene in the proceedings alongside Prunus by the tribunal de grande instance de Paris by reason of its capacity as holder of all the shares in Prunus.

17 In those circumstances, the tribunal de grande instance de Paris decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 56 et seq. EC preclude legislation such as that laid down by Article 990 D et seq. of the Code général des impôts which grants legal persons having their effective centre of management in France or, since 1 January 2008, in a Member State of the European Union, entitlement to exemption from the tax at issue and which, as regards legal persons having their effective centre of management in the territory of a non-Member State, makes that entitlement conditional either on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between France and that State or on there being a requirement, under a treaty containing a clause prohibiting discrimination on grounds of nationality, that those legal persons are not to be taxed more heavily than legal persons having their effective centre of management in France?

(2) Does Article 56 et seq. EC preclude legislation such as that laid down by Article 990 F of the Code général des impôts which enables tax services to hold jointly and severally liable for payment of the tax provided for in Article 990 D et seq. of the Code général des impôts any legal person interposed between the party or parties liable to the tax and the immovable properties or rights in such properties?’

Consideration of the questions referred

Question 1

18 By its first question, the tribunal de grande instance de Paris asks essentially whether the principle of the free movement of capital must be construed as precluding national legislation, such as that at issue in the main proceedings, which exempts from the tax on the market value of immovable property located in the territory of a Member State of the European Union companies having their registered office in that State and makes entitlement to that exemption, for a company whose registered office is in the territory of an OCT, conditional either on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between that Member State and that territory or on there being a requirement, under a treaty containing a

clause prohibiting discrimination on grounds of the place of establishment, that those legal persons are not to be taxed more heavily than companies established in the territory of a Member State.

19 Since the British Virgin Islands, where Lovett and Grebell are registered, are included in the list of OCTs in Annex II to the FEU Treaty, it is necessary to consider whether Article 63 TFEU applies to movements of capital between Member States and OCTs.

20 Article 63 TFEU prohibits ‘all restrictions on the movement of capital between Member States and between Member States and third countries’. In view of the unlimited territorial scope of that provision, it must be regarded as necessarily applying to movements of capital to and from OCTs.

21 Accordingly, it is necessary to examine whether national legislation such as that at issue in the main proceedings is liable to impede free movement of capital.

22 It should be noted that the national legislation at issue in the main proceedings has already been examined by the Court in the light of Article 63 TFEU in Case C?451/05 *ELISA* [2007] ECR I?8251 and of Article 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) in Case C?72/09 *Établissements Rimbaud* [2010] ECR I?0000. It is apparent from *ELISA* (paragraph 60) that a cross-border investment in immovable property such as that at issue in the main proceedings constitutes a movement of capital within the meaning of Article 63 TFEU.

23 It has already been held in *ELISA* and *Établissements Rimbaud* that legislation such as that at issue in the main proceedings constitutes a restriction of the principle of the free movement of capital in so far as legal persons which do not have their centre of management in France are required, pursuant to Article 990 E(2) and (3) of the CGI, by contrast to other persons liable to the tax in question, to satisfy an additional condition in order to be entitled to an advantage, namely that there should be a convention or treaty concluded between the French Republic and the State concerned. In the absence of any such convention or treaty, a legal person which does not have its centre of management in France is deprived of the possibility of making a successful application for exemption from the 3% tax pursuant to Articles 990 D and 990 E(2) and (3) of the CGI. That additional condition may entail, for that category of legal persons, a de facto permanent regime of non-exemption from that tax, making investment in immovable property in France less attractive for such non-resident companies.

24 In the case in the main proceedings, it is not disputed that the French Republic and the British Virgin Islands have not signed any convention on administrative assistance to combat tax evasion and avoidance or any treaty which provides that legal persons which do not have their registered office in France are not to be taxed more heavily than legal persons with a registered office in that Member State.

25 It follows that legal persons with a registered office in the British Virgin Islands are deprived of the possibility of benefiting from exemption from the 3% tax. Accordingly, that tax regime makes investment in immovable property in France less attractive for such non-resident companies. The legislation at issue in the main proceedings therefore constitutes, for such companies, a restriction on free movement of capital, which is, in principle, prohibited by Article 63 TFEU.

26 Nevertheless, it is still necessary to verify whether, as the French Government and the European Commission contend, a restriction such as that at issue in the main proceedings may be regarded as a restriction which existed on 31 December 1993 under Article 64(1) TFEU.

27 Under Article 64(1) TFEU, the prohibition of restrictions on the free movement of capital, within the meaning of Article 63 TFEU, is without prejudice to the application to non-Member

States of any restrictions which existed on 31 December 1993 under national or European Union law adopted in respect of the movement of capital to or from such States involving direct investment, including investment in immovable property.

28 It is necessary to determine, first, whether, for the purposes of the application of the Treaty provisions on free movement of capital, OCTs are to be treated as Member States or non-Member States.

29 The Court has already held that the OCTs are subject to the special association arrangements set out in Part Four of the Treaty, with the result that, failing express reference, the general provisions of the Treaty, whose territorial scope is in principle confined to the Member States, do not apply to them (see Case C?260/90 *Leplat* [1992] ECR I?643, paragraph 10; Case C?181/97 *van der Kooy* [1999] ECR I?483, paragraph 37; Case C?110/97 *Netherlands* v *Council* [2001] ECR I?8763, paragraph 49; and Case C?300/04 *Eman and Sevinger* [2006] ECR I?8055, paragraph 46). OCTs therefore benefit from the provisions of European Union law in a similar manner to the Member States only when European Union law expressly provides that OCTs and Member States are to be treated in such a manner.

30 It should be noted that the EU and FEU Treaties do not contain any express reference to movements of capital between Member States and OCTs.

31 It follows that OCTs benefit from the liberalisation of the movement of capital provided for in Article 63 TFEU in their capacity as non?Member States.

32 That interpretation is supported by the provisions of the Seventh OCT Decision, adopted at a time when the movement of capital in relation to non-Member States was liberalised. Article 47(2) of that decision states that Article 64 TFEU is applicable mutatis mutandis to OCTs.

33 It is necessary to examine next whether a restriction such as that at issue in the main proceedings, which concerns investments in immovable property, can be regarded as a restriction which existed on 31 December 1993.

34 The Court has already held that the words ‘restrictions which exist on 31 December 1993’ presuppose that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-Member States which existed as part of the national legal order on 31 December 1993 but had not been maintained (Case C?101/05 *A* [2007] ECR I?11531, paragraph 48).

35 It is apparent from the case-file before the Court that the legislation at issue in the main proceedings was adopted by Law No 92?1376 of 30 December 1992 establishing a finance law for 1993 (JORF No 304 of 31 December 1992), which entered into force on 1 January 1993. The restriction on the free movement of capital from OCTs imposed by that legislation therefore existed before 31 December 1993, the date stated in Article 64(1) TFEU.

36 Moreover, it is not disputed that there are only minor differences in the wording of the legislation in force on 31 December 1993 and that applicable during the 2001 and 2002 tax years at issue in the main proceedings, which do not in any way affect the inherent logic of the legal provisions that have formed part of the legal order of the Member State concerned continuously since 31 December 1993.

37 It follows that the restrictions imposed by national legislation such as that at issue in the main proceedings are permissible in relation to OCTs under Article 64(1) TFEU.

38 In those circumstances, the answer to the first question referred is that Article 64(1) TFEU must be interpreted as meaning that Article 63 TFEU is without prejudice to the application of national legislation in force on 31 December 1993 which exempts from the tax on the market value of immovable property located in the territory of a Member State of the European Union companies having their registered office in the territory of that State and makes entitlement to that exemption, for a company whose registered office is in the territory of an OCT, conditional either on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between that Member State and that territory or on there being a requirement, under a treaty containing a clause prohibiting discrimination on grounds of nationality, that those legal persons are not to be taxed more heavily than companies established in the territory of that Member State.

Question 2

39 In the light of the foregoing, it is not necessary to provide an answer to Question 2.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 64(1) TFEU must be interpreted as meaning that Article 63 TFEU is without prejudice to the application of national legislation in force on 31 December 1993 which exempts from the tax on the market value of immovable property located in the territory of a Member State of the European Union companies having their registered office in the territory of that State and makes entitlement to that exemption, for a company whose registered office is in an overseas country or territory, conditional either on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between that Member State and that territory or on there being a requirement, under a treaty containing a clause prohibiting discrimination on grounds of nationality, that those legal persons are not to be taxed more heavily than companies established in the territory of that Member State.

[Signatures]

* Language of the case: French.